UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION AND SAFETY BOARD
WASHINGTON, D.C.

MICHAEL P. HUERTA,
ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION

Complainant,

v.

RAPHAEL PIRKER,

Respondent.

Docket No. CP-217

BRIEF OF *AMICUS CURIAE*
ANGEL EYES UAV, LLC
IN SUPPORT OF RESPONDENT, RAPHAEL PIRKER

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STATEMENT OF INTEREST

Angel Eyes UAV, LLC is a Florida-based company with expertise in technology integration on unmanned aircraft systems, or "UAS."[1] Angel Eyes UAV provides consulting services for non-military, commercial uses of unmanned aircraft systems. Angel Eyes UAV works with commercial interests in the United States and around the world to develop the technological integration necessary to optimize UAS commercial applications.

Angel Eyes UAV has focused its business on smaller UAS platforms that normally weigh less than twenty-five pounds. These smaller platforms are similar in size to the unmanned vehicles flown by hobbyists for recreational purposes.[2] The commercial applications for platforms of this size are numerous and varied, even at this early stage of the industry's development. The Association for Unmanned Vehicle Systems International ("AUVSI") estimates that commercial UAS applications will generate $13.6 billion in economic activity in the first three

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[1] Angel Eyes is active in helping to develop the UAS industry in Florida. For example, Angel Eyes UAV is one of the first three companies in Florida to assist with opening a UAS testing location in cooperation with NASA and Space Florida. *See, e.g., Space Florida Conducts First Authorized Unmanned Systems Demonstration in the State*, http://www.spaceflorida.gov/news/2014/03/13/space-florida-conducts-first-authorized-unmanned-systems-demonstration-in-the-state (last visited May 6, 2014).

[2] The unmanned vehicle flown commercially by Respondent Raphael Pirker is a "Ritewing Zephyr." This platform weighs less than five pounds and is commonly used by hobbyists for recreational purposes. Motion to Dismiss, p. 2 n.3.

years after integration of UAS into the national airspace. Darryl Jenkins & Dr. Bijan Vasigh, *The Economic Impact of Unmanned Aircraft Systems Integration in the United States*, p. 2 (March 2013), *available at* http://www.auvsi.org/resources/economicreport (last visited May 6, 2014) (hereinafter, "Jenkins & Vasigh"). Agricultural and public safety applications will account for approximately ninety percent of this initial growth. *Id.*

Despite the commercial potential for this new industry, the Federal Aviation Administration ("FAA") takes the position that commercial operations are effectively off-limits in the National Airspace System ("NAS").[3] This position is at odds with the FAA's permissive approach to regulating hobbyists. Under the FAA's current guidance, hobbyists can fly UAS platforms recreationally with little

[3] For example, the FAA published a "Mythbusters" item that threatens enforcement action against commercial operations while offering no guidance on how to fly commercially. Federal Aviation Administration, *Busting Myths About the FAA and Unmanned Aircraft – Update*, http://www.faa.gov/news/updates/?newsId=76381 (updated on March 7, 2014; last visited May 6, 2014). Despite its aggressive public position, the FAA has acknowledged that commercial operations can be approved through the Certificate of Authorization ("COA") process. Unmanned Aircraft Systems Operational Approval, Notice N 8900.227, p. 4, sec. 9(a) (Effective Date July 30, 2013). The FAA has only approved two UAS models for commercial operations, both of which are restricted to flying in the Arctic. *Busting Myths*, at Myth #4 ("To date, only two UAS models . . . have been certified for commercial use, and they are only authorized to fly in the Arctic."). Congress specifically directed the FAA to expedite approval of commercial operations in the Arctic in the FAA Modernization and Reform Act. FAA Modernization and Reform Act of 2012, § 332(d). Absent "direct orders" from Congress, the FAA has blocked all other commercial uses of unmanned aircraft systems.

regulation and no enforcement activity. This is true even if the UAS platforms flown for recreational use are functionally equivalent to those used for commercial purposes. This means that companies like Angel Eyes UAV are prevented from flying commercial missions that would be permissible if a hobbyist flew the missions recreationally.

Angel Eyes UAV is interested in this proceeding because the fine against Respondent Raphael Pirker is part and parcel of the FAA's campaign to stop commercial UAS operations. As the administrative law judge found below, the FAA is blocking commercial operations in the NAS without any regulations that would allow it to do so. *See* Order, p. 7-8. The FAA is responsible for the absence of regulations specific to UAS. The FAA has had rules for smaller vehicles (referred to by the FAA as "sUAS") under consideration since 2009. The FAA has pushed back the expected completion date repeatedly. U.S. Dept. of Transportation, *Report on DOT Significant Rulemakings*, § 5, "Operation and Certification of Small Unmanned Aircraft Systems (sUAS)" (April 2014), *available at* http://www.dot.gov/regulations/report-on-significant-rulemakings (last visited May 6, 2014).[4]

[4] The current schedule indicates that the FAA will publish its Notice of Proposed Rulemaking on November 4, 2014. *Report on DOT Significant Rulemakings*, § 5 (referencing publication date). There is no guarantee that the FAA will adhere to this schedule.

Angel Eyes UAV offers the unique perspective of a business that is interested in smart, sensible regulation of this emerging industry. Angel Eyes UAV, like other commercial interests, wants the FAA to draft sensible regulations that put all operators on notice of what is and is not permissible. In the absence of such guidance, law-abiding commercial firms that follow the FAA's restrictive COA process are at a detriment while others proceeding without official authorization are gaining profit and market share. This is the antithesis of good government and notice-based rulemaking.

The Board's decision in this case will have far-reaching consequences for the commercial UAS industry. If the Board rules in favor of the FAA, then it will have endorsed the FAA's ad-hoc regulatory approach that has circumvented the rulemaking process. The interests of Angel Eyes UAV are closely aligned with Mr. Pirker's in this matter. Just as there was no regulation that Mr. Pirker could have been expected to know that he had to follow, Angel Eyes UAV and other commercial operators have no functional guidance on how to operate in the NAS. This is in stark contrast to hobbyists, who can apparently fly without any restrictions apart from 'voluntary' compliance with the FAA's 'policy' statements. *See* Notice 2007-01, p. 5 (authority for hobbyists flying model aircraft is Advisory Circular 91-57 (1981), which is a one-page document outlining voluntary standards for hobbyists to adhere to).

The FAA has overstepped its bounds in levying a civil fine against Mr. Pirker under the same regulations that apply to operation of manned aircraft. The Board's decision in this case will determine whether other commercial operators are potentially subject to civil fines and other enforcement actions despite the lack of specific, binding regulations from the FAA. This case is therefore of utmost importance to Angel Eyes UAV and other commercial operators throughout the United States.

STANDARD OF REVIEW

The National Transportation and Safety Board (the "Board") applies a *de novo* standard of review to decisions of administrative law judges. *Administrator v. Dustman*, NTSB Order No. EA-5657, 2013 WL 1702568, at *3 (2013). In a *de novo* or plenary review of the administrative law judge's initial decision, the Board "has all the powers which it would have in making the initial decision." *Swaters v. Osmus*, 568 F.3d 1315, 1321 n.6 (11th Cir. 2009) (quoting 5 U.S.C. § 557(b)). *See also Singer v. Garvey*, 208 F.3d 555, 558 (6th Cir. 2000) (Board has plenary review authority with respect to ALJ decisions); *Janka v. Dept. of Transp.*, 925 F.2d 1147, 1149 (9th Cir. 1991) (same). Therefore, the Board is in the same position that the administrative law judge was with regard to deciding the issues in this case.

SUMMARY OF THE ARGUMENT

The core issue in this litigation is whether Respondent, Raphael Pirker, was subject to the Federal Aviation Regulations (FARs) when he flew a UAS for commercial purposes. As the administrative law judge found below, the FAA has not promulgated any rules that specifically address how unmanned aircraft systems should operate in the NAS. Order, p. 7-8.

Though the narrow question before the Board is whether the device flown by Mr. Pirker is an "aircraft" within the meaning of 14 C.F.R. Part 1, Section 1.1, and Part 91, Sections 91.1 and 91.13(a), the implications of this case reach much farther. The principle at stake here is whether the FAA can require operators of unmanned aircraft systems to follow all of the FARs – in the absence of a properly enacted rule – on pain of civil penalties and other enforcement actions. The administrative law judge below correctly held that the FAA's non-binding "policy statements" cannot be the basis for enforcement actions against commercial operators for their alleged failure to comply with the FARs.

Incredibly, the FAA argues in its appellate brief that it is entitled to create policy in this case through the adjudicative process instead of through formal rulemaking. FAA Appellate Brief, p. 11, 15, n. 11, 17. Though this principle may apply to some situations, the facts of this case show that the FAA is not entitled to any deference to its litigation positions. If the FAA prevails in this matter, then the

entire UAS industry is vulnerable to arbitrary enforcement actions based on whatever FAR the FAA believes should apply in a given case. This is not and cannot be the law.

The FAA's policy statements regarding UAS are either not binding on the FAA or the general public, or they represent a drastic change in policy that should have been accomplished through the formal rulemaking process. In either case, the FAA lacks the authority to levy a civil fine against Mr. Pirker or any other commercial UAS operator. The FAA is not entitled to any deference to the litigation position it has taken in this case, especially since the agency's previous statements indicate that the FARs are impossible for UAS operators to fully comply with. This state of affairs has created regulatory uncertainty that is impeding the growth of the commercial UAS industry. For these reasons, the decision of the administrative law judge should be affirmed.

ARGUMENT

I. The FAA Lacks the Authority to Levy a Civil Fine Against Commercial Operators of Unmanned Aircraft Systems Under Its Existing Rules.

The FAA has attempted to levy a civil fine against Mr. Pirker under 14 C.F.R. Section 91.13(a), a regulation that governs careless or reckless use of "aircraft" in the NAS. This action represents a stark change in agency policy that has governed the UAS industry for over thirty years. The FAA has not issued any

rule that binds UAS operators to follow all – or even a subset of – the FARs that govern operation of manned aircraft. In the absence of such a rule, the FAA's enforcement action against Mr. Pirker oversteps the agency's regulatory authority.

Moreover, the FAA has taken a position in this litigation that is contrary to its long-established approach to regulating unmanned aircraft systems. The FAA has historically refused to require model aircraft operators to comply with the FARs in any capacity. *See* Order, p. 3-4. The FAA has now disclaimed its prior policy statements and asserts the authority to use the adjudicatory process to apply the FARs to UAS operators. The FAA's attempt to establish policy through litigation rather than the rulemaking process is both disingenuous and self-serving. The FAA is not entitled to deference for the positions it has advanced in this action.

A. The FAA's Prior Policy Statements.

The FAA has issued two prior statements of its "policy" with regard to use of unmanned aircraft systems like the one used by Mr. Pirker. The first, Advisory Circular 91-57, was issued in 1981. This guidance, commonly referred to as AC 91-57, is a one-page document that provides a minimal set of standards for hobbyists to voluntarily comply with when flying model aircraft recreationally. AC 91-57 (1981). These instructions were intended to help hobbyists to avoid problems and to create a "good neighbor environment with affected communities

and airspace users." AC 91-57, ¶ 2. This policy remained the only guidance from the FAA for over twenty years.

In 2007, the FAA disavowed AC 91-57 by issuing a "policy statement" that excluded commercial operations from its voluntary guidelines. Notice 2007-01. This difference in application was based solely on the use to which an unmanned system was put. *Id.* In the 2007 notice, the FAA stated the following with regard to its policy on domestic UAS operations:

> The current FAA policy for UAS operations is that **no person may operate a UAS in the National Airspace System without specific authority**. For UAS operating as public aircraft the authority is the COA, for UAS operating as civil aircraft the authority is special airworthiness certificates, **and for model aircraft the authority is AC 91-57**.
>
> The FAA recognizes that people and companies other than modelers might be flying UAS with the mistaken understanding that they are legally operating under the authority of AC 91-57. **AC 91-57 only applies to modelers, and thus specifically excludes its use by persons or companies for business purposes**.

Notice 2007-01, p. 5-6 (2007) (emphasis added).[5]

[5] A detailed history of AC 91-57 and Notice 2007-01 is set forth in the Motion to Dismiss and Reply Memorandum filed by Mr. Pirker below. Motion to Dismiss, p. 13-22; Reply Memorandum, p. 2-7.

The reasonable inference from this guidance is that AC 91-57 provides specific authority for model aircraft to be flown in the NAS. The FAA gave no explanation for why commercial uses of "model aircraft" platforms are excluded from flying under the authority of AC 91-57 when identical platforms may be flown recreationally under the same standards. Nevertheless, the FAA considers this 2007 guidance to be the wellspring of its authority to enforce a blanket ban on commercial UAS operations in the United States. *See* Motion to Dismiss, p. 17-27.

The administrative law judge below cited both AC 91-57 and Notice 2007-01 in support of his conclusion that the FAA has never held model aircraft operators responsible for compliance with the FARs that apply to manned aircraft. Order, p. 5-6. These policy statements, coupled with the FAA's lack of enforcement of the FARs against operators of model aircraft, factored into the administrative law judge's decision that the FAA lacked authority to enforce the FARs against model aircraft operators. Order, p. 6-7.

B. The FAA Admits That Its Prior Policy Statements Are Not Binding On Itself or The General Public.

Now that the FAA has lost its initial argument in this case, it has resorted to the position that operators of all unmanned aircraft systems – including model aircraft flown for sport or recreational purposes – must comply with the FARs applicable to manned aircraft. FAA Appellate Brief, p. 10-11. In its discussion of

the significance of AC 91-57 and Notice 2007-01, the FAA emphasizes that the "guidance" provided to the public is subject to voluntary compliance only, and that "[i]t is axiomatic that [advisory circulars] **not regulatory in nature**." *Id.* at 11, n.11 (emphasis added). Thus, the FAA contends that the FARs have always applied to operators of unmanned aircraft like Mr. Pirker, regardless of how the devices are used. *Id.*

The FAA goes so far as to state that AC 91-57 "contains no content that could be construed or interpreted as a waiver of compliance with the Federal Aviation Regulations." FAA Appellate Brief, p. 10. According to the FAA, even hobbyists are subject to the FARs notwithstanding the "voluntary" standards articulated in AC 91-57. *See id.*

C. The FAA Is Not Entitled to Deference to its Litigation Position.

The FAA's position in this litigation is that the FARs are applicable to all UAS operations. This represents a disavowal of the FAA's decades-long position on how unmanned systems should be regulated. In the absence of a regulation that clearly articulates which FARs are applicable to unmanned systems, the FAA's litigation position is not due any deference from the Board.

Ordinarily, an agency's interpretation of an ambiguous regulation is entitled to deference even when that interpretation is advanced in a legal brief. *Christopher*

v. SmithKline Beecham Corp., __ U.S. __, 132 S.Ct. 2156, 2166 (2012).[6] However, deference to an interpretation advanced in this manner is inappropriate when the agency's interpretation is "plainly erroneous or inconsistent with the regulation," or that there is "reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'" *Christopher*, 132 S.Ct. at 2166. In the context of litigation, an agency's interpretation of its regulations may be suspect when it conflicts with a prior interpretation or when "it appears that the interpretation is nothing more than a 'convenient litigating position' or a '*post hoc* rationalizatio[n]' advanced by an agency **seeking to defend past agency action against attack**." *Id.* at 2166-67 (emphasis added; internal citations omitted).

The *Christopher* case is factually similar to the FAA's enforcement action against Mr. Pirker. In *Christopher*, the U.S. Department of Labor articulated a new interpretation of federal wage and hour regulations that could have resulted in "potentially massive liability" on pharmaceutical companies. *Id.* at 2161, 2167. The wage and hour requirements do not apply to employees that are employed as outside salesmen. *Id.* at 2161. The Department traditionally viewed pharmaceutical

[6] The Supreme Court in *Christopher* explained that this general rule comes from *Auer v. Robbins*, 519 U.S. 452 (1997) and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Christopher*, 132 S.Ct. at 2166.

"detailers" as outside salesmen that were exempt from the wage and hour laws. *Id.* at 2167-68. This interpretation held sway for over fifty years. *Id.* at 2168, n.16.

The Department first advanced its view that pharmaceutical detailers were not exempt outside salesmen in an amicus brief it filed with the Second Circuit in 2009. *Id.* at 2165. The Department continued to advance this new interpretation in other cases, including the case before the Court in *Christopher*. *Id.*

The Court in *Christopher* held that the litigation position advanced by the Department in its amicus briefs was not entitled to deference. *Id.* at 2168-69. The Court explained that:

> In this case, there are strong reasons for withholding the deference that *Auer* generally requires. Petitioners invoke the DOL's interpretation of ambiguous regulations to impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced. **To defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties "fair warning of the conduct [a regulation] prohibits or requires."**

Christopher, 132 S.Ct. at 2167 (emphasis added; quoting *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (C.A.D.C. 1986)).

The element of "surprise" embedded in the Department's new interpretation was key to the Court's decision. Before the Department filed its amicus brief in

2009, the pharmaceutical industry had no indication that pharmaceutical detailers might be subject to wage and hour laws. Instead, the industry had strong reason to believe that such employees *were exempt* due to the Department's decision not to take any enforcement action over the course of fifty years. *Id.* at 2168. The Court explained:

> Until 2009, the pharmaceutical industry had little reason to suspect that its longstanding practice of treating detailers as exempt outside salesmen transgressed the FLSA. **The statute and regulations certainly do not provide clear notice of this.**
>
> . . .
>
> Even more important, despite the industry's decades-long practice of classifying pharmaceutical detailers as exempt employees, **the DOL never initiated any enforcement actions with respect to detailers or otherwise suggested that it thought the industry was acting unlawfully**. We acknowledge that an agency's enforcement decisions are informed by a host of factors, some bearing no relation to the agency's views regarding whether a violation has occurred. . . . **But where, as here, an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute**. As the Seventh Circuit has noted, while it may be "possible for an entire industry to be in violation of the [FLSA] for a long time without the Labor Department noticing," **the "more plausible hypothesis" is that the Department did not think the industry's practice was unlawful**.

Christopher, 132 S.Ct. at 2167-68 (emphasis added; internal citations omitted).

The FAA's actions in this case are analogous to those of the Department of Labor in *Christopher*. Prior to this litigation, the FAA has never applied the FARs to operators of unmanned aircraft systems. There is no question that the FAA was aware that hobbyists have been using unmanned systems for over thirty years, as AC 91-57 was issued in 1981. Not once in those thirty years has the FAA put hobbyists or commercial UAS operators on notice that they might be subject to fines for failure to comply with the FARs.

This action represents the first time that the FAA has interpreted the FARs to apply to all operators of unmanned systems. The FAA's new interpretation is the essence of unfair surprise to those regulated by the agency. As the Court in *Christopher* explained, "[i]t is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference." *Christopher*, 132 S.Ct. at 2168.

Therefore, the FAA's interpretation of the FARs that it has advanced in this case should only be afforded deference in proportion to the "thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to

persuade." *Christopher*, 132 S.Ct. at 2168-69 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001)).

Because the FAA has *not* gone through the rigors of the rulemaking process, its position is not entitled to any deference by the Board. *See Price v. Stevedoring Services of America, Inc.*, 697 F.3d 820, 829-30 (9th Cir. 2012) (deference to agency interpretations is grounded in the agency's prior research and consideration of the issues through the formal rulemaking process). In the absence of a rule stating which, if any, of the FARs are applicable to UAS (whether operated for recreational or commercial use), the FAA is free to make up the rules as it initiates enforcement actions. *Price*, 697 F.3d at 830 ("An agency can ordinarily change its litigating position from one case to another, without any party having grounds to complain that doing so violates the 'law.'"). The FAA therefore has no basis to demand special deference to its position here. *See id.* ("Without a basis in agency regulations or other binding agency interpretations, there is usually no justification for attributing to an agency litigating position 'the force of law.'" (quoting *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001)).

In the absence of a formal rule that requires UAS operators to comply with the FARs, the FAA has no basis to demand that the Board defer to its litigation

position in this matter.[7] The Board should therefore review the facts of this case without giving any undue credit to the FAA's interpretation of the FARs. The administrative law judge did just that in reaching his decision below. The administrative law judge's well-reasoned decision should be affirmed.

D. The FAA Admits That UAS Operators Cannot Comply With the FARs.

The FAA is attempting to levy a civil fine against Mr. Pirker under the existing FARs based on the theory that all the FARs apply to UAS operators. FAA Appellate Brief, p. 10-11. This theory is contrary to statements made by the FAA to the effect that the existing FARs cannot be applied consistently to UAS operations. The most notable statements appear in the FAA's "Roadmap" for integrating UAS into the national airspace and its UAS Operational Guidance that sets forth the current standards for flying UAS domestically.

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[7] Prior to the Pilot's Bill of Rights that Congress passed in 2012, the Board was required to defer to the FAA's interpretations of its own regulations in all cases. *See* Pilot's Bill of Rights, Pub. L. No. 112-153, § 2(c)(2) (2012) (amending 49 U.S.C. § 44709(d)(3)). Before the 2012 amendment, the Board was "bound by all validly adopted interpretations of laws and regulations the Administrator carries out **and of written agency policy guidance available to the public** related to sanctions to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law." 49 U.S.C. § 44709(d)(3) (2011) (emphasis added). This language, which formerly would have bound the Board to defer to the FAA's "policy guidance," was stricken by the 2012 amendment. Pilot's Bill of Rights, Pub. L. No. 112-153, § 2(c)(2); *see also* 49 U.S.C. § 44709(d)(3) (2012) (deference requirement has been removed).

The FAA published its "Roadmap" for integrating unmanned systems into the NAS on November 7, 2013. Federal Aviation Administration, *Integration of Civil Unmanned Aircraft Systems (UAS) in the National Airspace System (NAS) Roadmap* (1st ed. 2013) (the "Roadmap"). The Roadmap was drafted in response to a Congressional mandate in the FAA Modernization and Reform Act. FAA Modernization and Reform Act of 2012, § 332(a)(5).[8] The Roadmap "outlines the actions and considerations needed to enable UAS integration into the NAS," and was developed by the FAA and the UAS Aviation Rulemaking Committee over the course of a year. Roadmap, at 1.

The FAA notes in several parts of the Roadmap that the current FARs are inadequate to address operation of UAS in the national airspace. Examples of these statements include the following:

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[8] This section states:

> Not later than 1 year after the date of enactment of this Act, the Secretary shall approve and make available in print and on the Administration's Internet Web site a 5-year roadmap for the introduction of civil unmanned aircraft systems into the national airspace system, as coordinated by the Unmanned Aircraft Program Office of the Administration. The Secretary shall update the roadmap annually.

FAA Modernization and Reform Act, § 332(a)(5).

- Section 2.2.1, p. 14: "[M]any policy, guidance, and regulatory products will need to be reviewed and revised to specifically address UAS integration into the NAS."

- Section 2.2.1, p. 15: "Although aviation regulations have been developed generically for all aircraft, until recently these efforts were not done with UAS specifically in mind. This presents certain challenges because the underlying assumptions that existed during the previous efforts may not now fully accommodate UAS operations. As an example, current regulations address security requirements for cockpit doors. However, these same regulations lack a legal definition for what a "cockpit" is or where it is located. This presents a challenge for UAS considering that the cockpit or "control station" may be located in an office building, in a vehicle, or outside with no physical boundaries. Applying current cockpit door security regulations to UAS may require new rulemaking, guidance, or a combination of both."

- Section 2.2.3, p. 18: "Existing standards ensure safe operation by pilots actually on board the aircraft. These standards may not translate well to UAS designs where pilots are remotely located off the aircraft."

- Section 3.3, p. 24: "[E]xisting rules have not been fully tailored to the unique features of UAS."

- Section 3.3, p. 24-25: "[T]he appropriate regulations are also being reviewed for applicability to UAS operations by the FAA, industry groups, and the UAS ARC. The results of this review will determine any regulatory gaps that need to be addressed in the development of specific UAS guidance and rulemaking."

Roadmap, p. 14, 15, 18, 24-25. Through these statements, the FAA has acknowledged that the existing FARs must be amended in order to effectively address operation of unmanned systems in the NAS.

The FAA has also acknowledged the bad fit between the current FARs and unmanned systems in its Unmanned Aircraft Systems Operational Approval dated July 30, 2013. Unmanned Aircraft Systems (UAS) Operational Approval, Notice N 8900.227 (Effective Date July 30, 2013). Section 5(b) of the UAS Operational Approval contains the following "policy" statement:

> **b. Policy.** Policy identifies Unmanned Aircraft (UA) as "aircraft" flown by a "pilot" regardless of where the pilot is located. Aircraft and pilots must demonstrate compliance with applicable sections of Title 14 of the Code of Federal Regulations (14 CFR) to operate in the NAS. **However, UA are not compliant with certain sections of 14 CFR. For instance, the absence of an onboard pilot means that the "see-and-avoid" provisions of 14 CFR part 91, § 91.113, cannot be satisfied.** Without an onboard pilot, there is a significant reliance on the command and control link, and a greater emphasis on the loss of functionality associated with lost link. **Furthermore, for air traffic control (ATC) operations requiring visual means of maintaining in-flight separation, the lack of an onboard pilot does not permit ATC to issue all of the standard clearances or instructions available under the current edition of FAA Order 7110.65, Air Traffic Control.** Consequently, to ensure an equivalent level of safety, UAS flight operations require an alternative method of

> compliance (AMOC) or risk control to address their "see-and-avoid" impediments to safety of flight, and any problems they may generate for ATC. **In the future, permanent and consistent methods of compliance will be needed for UAS operations in the NAS without the need for waivers or exemptions.**

UAS Operational Approval, § 5(b) (emphasis added). Through this statement, the FAA acknowledges that UAS operators cannot comply with the FARs as they are written.

The clear implication from the FAA's statements is that the existing FARs are impossible for UAS operators to comply with. This reality contradicts the FAA's position in this litigation that all UAS operators must comply with the FARs on pain of receiving a civil fine. If the FAA prevails here, then UAS operators will be faced with a paradox: they will be required to comply with the FARs while the FAA has acknowledged that doing so is impossible. The FARs and the statutes that they were enacted to implement should not be interpreted in a way that makes compliance impossible. This is the essence of an absurd result that should be avoided. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

II. Regulatory Uncertainty is Impeding the Growth of the UAS Market.

The uncertainty caused by the FAA's ad-hoc approach to regulating UAS operations is impeding the growth of the commercial UAS market. A study commissioned by AUVSI estimates that commercial UAS applications will account for more than $13.6 billion in economic activity in the first three years after integration of UAS into the national airspace. Jenkins & Vasigh, p. 2. The AUVSI study predicts that the domestic market "will grow sustainably for the foreseeable future, cumulating to more than $82.1 billion between 2015 and 2025." *Id.*

The AUVSI study may significantly understate the potential size of the commercial market. The authors of the study principally base their estimate on precision agriculture and public safety, two applications that the authors believe will represent "approximately 90% of the known potential markets for UAS." *Id.* While these markets are certain to be significant, the potential commercial applications for UAS are as varied as they are unpredictable. Any business operation that can make use of data collected by a UAS platform is a potential customer. Given the uniquely American tendency to transform new technologies into unexpected, highly valuable commercial enterprises, the AUVSI estimates may represent the "tip of the iceberg" of this latent business sector.

The FAA's delay in integrating UAS into the national airspace is costing the U.S. economy at least $10 billion per year in potential economic impact. *Id.* This has real consequences for companies like Angel Eyes UAV that are relying on the FAA to work diligently to integrate UAS into the national airspace. The FAA's repeated delays in issuing an sUAS rule and its aggressive stance against commercial operations are harming companies that could otherwise be serving clients in low-risk fields.[9]

Moreover, the FAA's position that commercial operators are subject to fines and enforcement action while hobbyists have free rein to operate under AC 91-57 is patently unfair. *See* Notice 2007-01. A recreational UAS operation over agricultural land is not rendered "unsafe" if the operator is paid for data collected during the flight. The distinction made between hobbyists and commercial operations in Notice 2007-01 is without a foundation in fact, law, or common sense.

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[9] The delay in promulgating an sUAS rule is a classic example of letting the "best" get in the way of the "good." An incremental approach to allowing UAS operations in low-risk areas and industries would be an immediate way to allow the commercial industry to start thriving. The low-risk precision agriculture market is a logical place to start. A reasonable first step could be to create a rule that allows commercial operations at safe distances from airports and urban areas, under 400 feet, over private agricultural property, and with the permission of the landowner. An sUAS that weighs less than twenty-five pounds poses no threat to anyone when it is flying over a soybean field while nothing else is in the air. The FAA's resistance to an incremental step like this is indicative of its obstructionist posture.

Law-abiding companies like Angel Eyes UAV are at a disadvantage in this regulatory gray area. If the the FAA's public statements are to be taken at face value, Angel Eyes UAV cannot fly commercial UAS operations without a Special Airworthiness Certificate – Experimental Category or a "Commercial COA."[10] The FAA acknowledges that the SAC-EC approvals are "very limited" in scope. *Frequently Asked Questions*, point 3. Only two commercial operations have been approved through the COA process, both of which are restricted to the Arctic. *Supra*, note 3. The Arctic missions occurred only in response to the direct urging of Congress. *See id.* This restrictive regulatory stance means that commercial operations are practically impossible to conduct domestically.[11]

In this enforcement action, the FAA has coupled its lack of regulatory guidance with an assertion that all UAS operators must comply with the FARs that

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[10] *See* Federal Aviation Administration, *COA: Frequently Asked Questions*, https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/aaim/organizations/uas/coa/faq/ (last visited May 6, 2014) ("Currently, civilian companies may not operate a UAS as part of a business without obtaining a Special Airworthiness Certificate – Experimental Category (SAC-EC). However, this SAC-EC is very limited in scope of operational use."); Unmanned Aircraft Systems Operational Approval, Notice N 8900.227, p. 4, sec. 9(a) (Effective Date July 30, 2013) (commercial COA applications are possible).

[11] Creating commercial UAS regulations need not be done in a vacuum. Australia has blazed a trail in this area of regulation. *See, e.g., Civil Aviation Safety Regulations 1998*, Part 101 (Unmanned Aircraft and Rockets) (Austl.), *available at* http://www.comlaw.gov.au/Details/F2014C00612/Html/Volume_3#_Toc386709282 (last visited May 6, 2014). The FAA could use the Australian regulations as a template for UAS operations in the national airspace.

govern manned aircraft. This untenable position is artificially repressing the commercial UAS market at a critical time in our nation's economic history.

The administrative law judge below was correct in finding that the FAA cannot enforce the FARs governing manned aircraft against UAS operators. Instead of expending its energy on artificially impeding the growth of the commercial UAS market, the FAA should fast-track reasonable rules that will allow the industry to thrive. The Board should affirm the decision below and repudiate the FAA's ad-hoc approach to regulating commercial UAS operations.

CONCLUSION

Angel Eyes UAV respectfully requests that the Board rule in favor of Respondent and affirm the decision below.

CERTIFICATION OF WRITTEN CONSENT

Angel Eyes UAV certifies that the parties to this action have given their written consent to the filing of this brief pursuant to 49 C.F.R. § 821.9(b). This written consent was obtained via electronic mail, a copy of which is attached hereto as Exhibit A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically to the following this 6th day of May, 2014:

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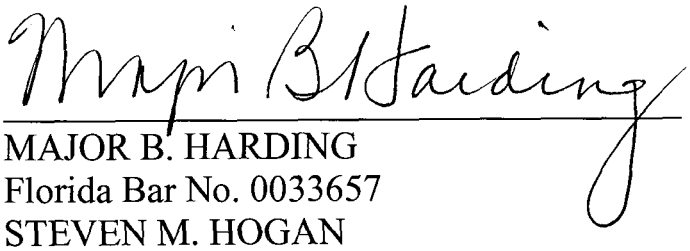

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EXHIBIT A

Steve Hogan

From: Schulman, Brendan <BSchulman@KRAMERLEVIN.com>
Sent: Thursday, May 01, 2014 1:04 PM
To: Steve Hogan; susan.caron@faa.gov
Cc: brendan.kelly@faa.gov
Subject: RE: Request for Consent to File Amicus Brief: Administrator v. Pirker, Docket No. CP-217

Mr. Hogan,

Respondent consents to the submission of your amicus brief, and you may use this email as our written consent contemplated under the rule.

Very truly yours,
Brendan Schulman

Brendan M. Schulman | Special Counsel
T: 212-715-9247 F: 212-715-8220 E: BSchulman@KRAMERLEVIN.com Kramer Levin Naftalis & Frankel LLP | 1177 Avenue of the Americas | New York, New York 10036 <http://www.kramerlevin.com/>

-----Original Message-----
From: Steve Hogan [mailto:shogan@ausley.com]
Sent: Thursday, May 01, 2014 12:30 PM
To: susan.caron@faa.gov
Cc: brendan.kelly@faa.gov; Schulman, Brendan
Subject: RE: Request for Consent to File Amicus Brief: Administrator v. Pirker, Docket No. CP-217

Thank you for responding so quickly.

-----Original Message-----
From: susan.caron@faa.gov [mailto:susan.caron@faa.gov]
Sent: Thursday, May 01, 2014 12:28 PM
To: Steve Hogan
Cc: brendan.kelly@faa.gov; bschulman@kramerlevin.com
Subject: Re: Request for Consent to File Amicus Brief: Administrator v. Pirker, Docket No. CP-217

Mr. Hogan - The FAA will not oppose your filing of an amicus brief on behalf of your client in the Pirker case so long as your client otherwise meets the requirements of section 821.9(b).
Susan S. Caron
AGC-300
(202) 267-7721 (telephone)

(202) 267-5106 (fax)

From: Steve Hogan <shogan@ausley.com>

To: Susan Caron/AWA/FAA@FAA, Brendan Kelly/AEA/FAA@FAA, "bschulman@kramerlevin.com" <bschulman@kramerlevin.com>

Date: 04/30/2014 02:48 PM

Subject: Request for Consent to File Amicus Brief: Administrator v. Pirker, Docket No. CP-217

Dear Counsel,

I am writing on behalf of my client, Angel Eyes UAV, LLC, to request leave to file an amicus brief in the Administrator v. Pirker appeal to the NTSB, Docket No. CP-217. Angel Eyes would like to file an amicus brief in support of Respondent, Raphael Pirker.

Under 49 C.F.R. sec. 821.9(b), an amicus brief may be filed with the written consent of all parties. If your client consents to this request, a reply email to that effect will suffice for the written consent required by the rule.

You can reach me directly at 850-425-5344 with any questions you may have.
Thank you once again for your assistance in this matter.

Sincerely,
Steve Hogan

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